90-446

NO. _____

Supreme Court, U.S.
FILED
JUL 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

W.R. BENINTENDI and DELORES BENINTENDI

Petitioners

vs.

UNION NATIONAL BANK OP LITTLE ROCK, PHILIP WAYNE REED, WESTERN NATIONAL BANK, PRAY, WALKER, JACKMAN, WILLIAMSON & MARLAR, and ANTOINETTE LYNN REED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, DIVISION III, OF THE STATE OF OKLAHOMA

JOHN M. YOUNG
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(918) 224-3131
ATTORNEY FOR PETITIONERS

3/B1:10

QUESTIONS PRESENTED

Whether the application of certain state statutes and decisions by the state court below to the facts in the case at bar deprive the petitioners of their property without due process of law in violation of the 5th and 14th Amendments to the Constitution of the United States.*

*All parties to the proceeding in the state courts below are listed in the caption of the case in this court.

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OPENING STATEMENT

W.R. Benintendi and Delores Benintendi, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the State of Oklahoma, Division III, entered in the state court below on December 19, 1989 which the Supreme Court of the State of Oklahoma declined to review by Petition for Certiorari pursuant to an order entered on May 8, 1990.

JUDGMENTS OF THE COURTS BELOW

The order of the Supreme Court of the State of Oklahoma entered in the case below (unreported) on May 8, 1990 and denying certiorari is found in page 1 of Appendix A. The memorandum opinion of the Court of Appeals of the State of Oklahoma, Division III, filed on December 19, 1989 is found on pages 2 through 8 of Appendix A. The journal entry of judgment of the trial court entered in the District Court of Tulsa County, State of Oklahoma Case #CJ-86-7721 entered on April 13, 1987 and filed on May 26, 1987 is contained in pages 9 through 13 of Appendix A, and the journal entry of judgment entered by the District Court of Tulsa County, State of Oklahoma in Case #CJ-87-4317 entered on April 24, 1987 and filed on August 26, 1987 is attached as pages 14 through 18 of Appendix A. The appeals of the two trial court journal entries of judgment were consolidated for purposes of appeal.

JURISDICTION

The judgment of the state court sought to be reviewed by this Honorable Court was entered by the Court of Appeals, Division III, on December 19, 1989. The petitioners thereafter petitioned for rehearing of this decision which was denied by said Court of Appeals on February 5, 1990. The petitioners then timely filed on February 26, 1990 a petition for certiorari before the Supreme Court of the State of Oklahoma to review this decision. That petition for certiorari was denied by order entered by the Supreme Court of the State of Oklahoma on May 8, 1990. The judgment of the Court of Appeals is therefore the judgment of the highest court of the State of Oklahoma and is reviewable by the Supreme Court of the United States since the highest court of the state declined to review it, Mellon v. O'Neil, (1927) 275 U.S. 212, 72 L.Ed 245, 48 S.Ct. 62; Bacon v. Texas, (1896) 163 U.S. 207, 42 L.Ed 132, 16 S.Ct. 1023; Michigan Wisconsin Pipe Line Co. v. Calvert (1954) 347 U.S. 157, 98 L.Ed 583, 74 S.Ct. 396, reh den 347 U.S. 931, 98 L.Ed 1083, 74 S.Ct. 528; Sullivan v. Texas (1908) 207 U.S. 416, 52 L.Ed. 274, 28 5. Ct. 215; Cuyahoga River Power Co. v. Northern Realty Co. (1917) 244 U.S. 300, 61 L.Ed 1153, 37 S.Ct. 643; Adam v. Saenger (1938) 303 U.S. 59, 82 L.Ed 649, 58 S.Ct. 454, reh den 303 U.S. 666, 82 L.Ed. 1123, 58 S.Ct. 640; American R. Express Co. v. Levee (1923) 263 U.S. 19, 68 L.Ed 140, 44 S.Ct. 11;Missouri, K. & T.R. Co. v. Elliott (1902) 184 U.S. 530, 46 L.Ed. 673, 22 S.Ct. 446; Interstate Circuit, Inc. v. Dallas (1968) 390 U.S. 676, 20 L.Ed. 2d 225, 88 S.Ct. 1298; Cohen v. California (1971) 403 U.S. IS, 29 L.Ed 2d 284, 91 S.Ct.1780, reh den 404 U.S. 876, 30 L. Ed 2d 124, 92 5. Ct. 26. Jurisdiction in the United States Supreme Court to review the aforesaid state court judgment by writ of certiorari is conferred by 28 U.S.Code Section 2101 (C).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following amendments to the Constitution of the United States are involved:

Amendment V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV: Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutory provisions of the State of Oklahoma involved are reproduced in Appendix B.

STATEMENT OF THE CASE

This case involves the appeal of the Oklahoma trial court's rulings in two separate cases the first of which was filed by the second mortgage holder of a tract of residential property to foreclose on its mortgage. Later the first mortgage holder filed a second suit also seeking foreclosure. The mortgage foreclosure proceedings were fraught with procedural errors. The sheriff's sale of the foreclosure of the second mortgage was conducted first at which the petitioners purchased the property under the understanding that they were purchasing the property free and clear of other claims (which was stated to be the case in the journal entry of judgment of the second mortgage holder's foreclosure suit). Thereafter the first mortgage holder sold the property at a subsequent sheriff's sale and was itself the successful purchaser, thereby extinguishing the rights of the petitioners. The petitioners objected to the confirmation of both sales and, following hearing and extensive briefing before the trial court, the trial court overruled the objections to confirmation of both sales and attempted to correct some of the procedural errors by orders nunc pro tunc. From these adverse and erroneous rulings, the appellants perfected two appeals which were consolidated by the Supreme Court of Oklahoma into one appeal. The facts are somewhat tedious to relate, as they involve the near simultaneous progress of the two foreclosure cases.

On December 4, 1986 the Western National Bank of Tulsa filed Tulsa County, Oklahoma case number CJ-86-7721 seeking foreclosure of residential real estate upon which it had a second mortgage executed by Phillip Wayne Reed. Joined as defendants were the Union National Bank of Little Rock, the first mortgage holder, and the law firm of Pray, Walker, Jackman, Williamson and Marlar, who had a third lien upon the property for legal services performed on behalf of Mr. Reed. The petition alleged a default in $36,390.98 in principal, together with the obligation to pay accrued interest, costs, and attorney fees of Philip Wayne Reed and Antoinette Reed. The defendant, Union National Bank, filed an answer consisting basically of a general denial with the reservation of a right to amend. It amended its answer on January 12, 1987, but still did not allege any default in the payment of the note secured by its first mortgage.

Western then filed a motion for summary judgment in CJ-86-7721 and the issues were reduced to judgment. Following hearing on April 13, 1987 [illegible] a journal entry of judgment was approved as to form and content by both the attorneys for the plaintiff, the Western National Bank and the first mortgage holder, the Union National Bank. The journal entry of judgment recited that the defendants, Phillip Wayne Reed and the attorney firm of Pray, Walker, Jackman, Williamson, and Marlar were in default and were therefore "barred, restrained, and enjoined from claiming any right, title, or interest in and to the subject property."

The journal entry of judgment ordered the foreclosure of the mortgage of Western upon the following described real property:

> The East Half of the South Three Hundred Twenty Feet (320) of Lot Two (2), Section Three (3), Township Seventeen (17) North, Range Fourteen (14) East, of the Indian Base and Meridan according to the United States Government survey thereof.

Any reference to the County and State of the Property ordered to be sold was omitted.

The journal entry of judgment also contained the following provisions:

> "9. From and after the sale of said real estate, all of the parties to this action, and each of them, and all persons claiming under them or any of them, shall be and they are hereby forever barred and foreclosed of and from any and every lien upon right, title, interest, estate, or equity of redemption, in or to said real estate, or any portion thereof."

> "10. Upon confirmation of the sale hereinabove ordered, the Sheriff shall execute and deliver a good and sufficient deed to the real estate and improvements to the purchaser, who shall convey all the right, title, interest, estate and equity of redemption of all the parties herein, and all persons claiming under all of the parties herein, and each of them, since the filing of the Notice of Pendency of Action, and upon application of the purchaser, the Court Clerk shall issue a Writ of Assistance to the Sheriff who thereupon and forthwith shall

place said purchaser in full and complete possession and enjoyment of said real property and improvements."

Particularly noteworthy of the April 13, 1987 journal entry of judgment in CJ-86-7721 is the complete omission of any ruling upon a mandatory counterclaim which must be asserted by any other defendant, in this case the Union National Bank which later claimed to have a defaulted first mortgage.

At any rate, on August 11, 1987 Western in CJ-86-7721 filed a notice of sheriff's sale and mailed a copy of the notice only to the defendants, Union National Bank and Phillip Wayne Reed. Omitted was any mailing to Pray, Walker.

In the meantime, the Union National Bank on July 6, 1987 filed Tulsa County case number CJ-87-4317 wherein it sought the foreclosure of its first mortgage upon the same legal description contained in the journal entry of judgment in CJ-86-7721, but with the addition of the recitation that the property was "an addition in the City of Broken Arrow, Tulsa County, State of Oklahoma. Included as an additional defendant was Antoinette Lynn Reed. Originally included as defendants, but later on August 20, 1987 dismissed as defendants without prejudice, were Jane Doe Reed, John Doe Resident, and Jane Doe Resident. Journal entry of judgment was entered in CJ-87-4317 on August 24, 1987 but filed on August 26, 1987. The CJ-87-4317 journal entry of judgment held that there were three valid liens and claims upon the property as follows: (1) the first mortgage lien of Union, (2) the second mortgage lien of Western, and (3) the third mortgage lien of Pray, Walker.

The day after the entry of the journal entry of judgment on August 24, 1987 in CJ-87-4317, a sheriff's sale was held in case number CJ-86-7721. Sheriff's appraisers in CJ-86-7721 appraised the property (again with an incomplete legal description) at $100,000.00. It was at the August 25, 1987 sheriff's sale in CJ-86-7721 that the petitioners, W.R. Benintendi and Delores Benintendi purchased the property for a bid of $32,000.00. No reference was contained in the notice of the August 25, 1987 sheriff's sale of the attorney fees entered in favor of Union in the journal entry of judgment in case number CJ-86-4317 in the amount of $5,455.00 nor of $219.00 for abstracting, advances for taxes and hazard

insurance of $113.00, all further costs for service of process, $60.00 for the costs of preserving and maintaining the property, $80.33 and all other late charges, court costs, etc. which was entered the previous day, but not filed of record until August 26, 1987. Details about the circumstances of the interest of the Benintendis in the property and their bid will follow.

Thereafter on September 10, 1987 the Union National Bank, the plaintiff in CJ-87-4317, filed an application for order nunc pro tunc to correct the journal entry of judgment in its case reflecting that the defendant Western National Bank and Pray, Walker were in default. Before the journal entry of judgment was modified, however, the defendant, Western National Bank in CJ-87-4317 filed a motion to vacate default judgment on September 21, 1987, although at that time they had not been defaulted. Thereafter on September 23, 1987 the court in CJ-87-4317 did file an order nunc pro tunc which corrected what was stated to be a scrivener's error by holding that both Western and Pray, Walker were in default in CJ-87-4317. That motion was set twice but never ruled upon.

On September 10, 1987 the plaintiff in CJ-86-7721 filed a motion to confirm its sheriff's sale (finally stating that the property was situated in Tulsa County, Oklahoma) on September 11, 1987. According to the affidavit of mailing filed in CJ-86-7721 on September 22, 1987, notice of the hearing on the motion to confirm sale was mailed to Phillip Wayne Reed, the Union National Bank, and Pray, Walker, but no notice was stated to be mailed to the purchasers, the petitioners herein, nor to Antoinette Lynn Reed who was a claimant in the property according to the pleadings in CJ-87-4317.

On September 15 1987, Union filed in CJ-86-7721 a motion praying that the proceeds of the second mortgage foreclosure sale held on August 25, 1987 be paid to it since it had a superior first lien, although the prayer in this motion was contrary to the provisions of the journal entry of judgment which it had previously agreed to as to form and content.

The petitioners by this time realized that serious mistakes had been made with the sheriff's sale procedures in the two related cases. They filed a motion to set aside and vacate the August 25, 1987 sheriff's sale in CJ-86-7721 on September 24, 1987. Shortly thereafter, Union in CJ-87-4317 filed its notice of sheriff's sale to be held on October 29, 1987. The sheriff's sale in CJ-87-

4317 was then conducted on October 29, 1987 and the property, appraised in this case for $90,000.00 was sold to the plaintiff, Union National Bank, for $61,588.01. On October 29, 1987 a motion to confirm this sale was filed and mailed to all parties. The petitioners, through their present counsel, filed a Motion to Intervene, Motion to Consolidate, and an Objection to Confirmation of Sale on November 24, 1987. A supplement to the petitioners' objection to confirmation on the sale was filed on December 21, 1987.

Following a hearing the court in CJ-86-7721 denied the petitioners' motion to set aside and vacate the sheriff's sale and confirmed it on October 28, 1987. The petitioners, however, through their present counsel, timely filed a motion for a new trial.

Following supplemental briefing by the parties of their respective positions on the issues of whether or not either or both of the sales should be confirmed and whether or not the cases should be consolidated, the motions and objections were all set for hearing before the same trial judge on December 21, 1987.

After taking his decision under advisement, the trial court, on January 20, 1988 entered a minute order in the case. Without specifically ruling on the motions to consolidate, the court confirmed both sales and overruled all objections thereto filed by these petitioners. The effect of the rulings was that the petitioners' $32,000.00 purchase price was paid to the second mortgage holder to purchase its interest which was shortly cancelled by the first mortgage holder's foreclosure sale.

Several factual issues were raised in two evidentiary hearings held in the cases on October 23, 1987 and on December 21, 1987. The first hearing on October 23, 1987 was in CJ 86- 7721 and was the hearing on the motion to confirm sale and the objections filed by the appellants thereto. One of the questions was what the petitioners' understanding was regarding the existence of the first mortgage in bidding to buy the second mortgage, and what action, if any, by the plaintiff, the Western National Bank, prompted their actions. Prior to the foreclosure sales, the petitioners through a realtor had attempted to purchase the property, but, because of the foreclosures, the efforts to purchase the property through a realtor never reached fruition. Because, however, a written offer was presented by the petitioners (although it was not accepted), nevertheless, the mortgage holders were aware of their interest acquiring

in the property. The petitioner, Delores Benintendi, testified that she had a conversation with Steve Howe, an officer of the Western National Bank, who advised her that an auction would be held to sell to property on August 25 at 10:00 a.m. Her statement concerning the content of the conversation appears at page 16 of the October 23 and 28, 1987 transcript as follows:

> "A: Well, he mentioned — first of all, he asked me how much are you planning to bid. Well, it just caught me off guard, and I didn't know what I was going to bid at a sale, you know. I just said that depends. I don't know. That depends, and I said how much are you going to bid, you know, I just — and he said, well, the first mortgage has to be satisfied, you know, as far as, you know, they would satisfy the first mortgage, but, you know, I just thought they was going to satisfy the first mortgage. I couldn't imagine them bidding so low to start with.
>
> Q: And it was your belief that they were going to take care of that first mortgage?
>
> A: Yes, yes, or that somehow they would just write some of it off. I didn't know. I had heard some incredible things of write offs today with foreclosures."

Following this conversation with Mr. Howe, Mrs. Benintendi did appear at the sheriff's sale. She testified at page 15 was follows:

> "Q: Did the sheriff, in announcing the sale, say that this property was being sold subject to a first mortgage?
>
> A: I didn't hear him say subject to. I heard him say there was a first mortgage on it, and evidently he did, but I wouldn't have known what it meant anyway.
>
> Q: When you bid the thirty-two thousand dollars, did you — was it your thought that that was the total purchase price of this piece of property?
>
> A: Yes, definitely, yes."

No reference was made at the sheriff's sale as to any attorney fees which were in fact owed to the Union National Bank in the amount of $5,455.00 nor of any of the other miscellaneous costs totalling approximately $472.33 (October 23, and 28, 1987 transcript page 28).

On December 21, 1987 the court considered argument of counsel and the additional testimony from two witnesses in CJ-86-

7721 and argument on the motion to confirm sheriff's sale and objections thereto in CJ-87-4317.

Additionally, the petitioners called a carpenter as a witness who had visited the property on approximately Labor Day weekend and approximately the 25th or 26th of September. He observed certain items of vandalism damage to the premises in the interim which he estimated to be over $10,000.00.

Mrs. Benintendi also testified that she would not have been willing to purchase the property at the August 25, 1987 sale had the extensive damage which existed on the premises at the time of confirmation of the sale existed at the time of the sale.

Also important to note during the argument of counsel at the December 21, 1987 hearing was that the trial court agreed there was a mistake of fact in the Benintendis' purchase of the property and that counsel for the Western National Bank acknowledged there was a "defect in the terminology of the journal entry." Counsel, however, contended it was merely a scrivener's error which should be corrected by an application nunc pro tunc. Counsel for the appellants argued that if Mrs. Benintendi was mistaken as to the interest on which she was bidding and purchasing at the August 25, 1987 sale, the journal entry nevertheless stated exactly what Mrs. Benintendi thought the situation and terms of the purchase were.

The trial court stated at the outset of the hearing that "if there was any way I could legally find for the Benintendis in this case, that I would do that." Nevertheless, although numerous errors in both proceedings were pointed out to the court, the court by minute order entered on January 20, 1988 overruled the petitioner's motion for new trial and confirmed the second sale of the property to the Union National Bank over the petitioners' objections, thereby extinguishing the interest which they purchased at the first foreclosure sale for $32,000.00 in cash.

On appeal which was presented to the Court of Appeals, the intermediate appellate court of the State of Oklahoma, the petitioners demonstrated that the proceedings to reduce the issues to judgment in both cases and the execution sales conducted pursuant to those judgments were in direct violation of certain Oklahoma Statutes, specifically 12 O.S. Section 2013 (a) which provides for mandatory counterclaims. Additionally the journal entry of judgment as entered in case number CJ-86-7721 accorded full relief to

the parties. This journal entry of judgment was approved as to both form and content by the attorneys for both banks. The journal entry of judgment as set forth above recited specifically the petitioners' understanding of the terms of the sheriff's sale at which they purchased the property, but after the sheriff's sale, at the request of counsel for Western, the court amended the journal entry of judgment by order nunc pro tunc to provide that the petitioners purchased only a second mortgage and not the entire interest in the property.

Furthermore, 12 O.S. Section 762 provides that all execution sales of property must be for at least 2/3 of the appraised value. The property was appraised for $100,000.00 but as previously stated it sold to the petitioners for $32,000.00. The court, contrary to the express requirement of statute, however, and contrary to its original journal entry of judgment in CJ-86-7721, circumvented this requirement of law by deducting from the appraised value the amount of the first mortgage. That sale was therefore a nullity under Oklahoma Statutes, but the trial court nevertheless confirmed the sale and this action was affirmed by the Court of Appeals.

The notice of sale in the case was also defective because it was not mailed to the defendant, Pray, Walker, in CJ-86-7721 which is required by 12 0.5. Section 764 (1). Additionally the notice of sale was further defective because it failed to announce that the sale would be subject to attorney fees and costs of almost $6,000.00 which were added to the first mortgage thereby significantly reducing whatever equity would have been purchased by a purchaser of the second mortgage at a properly conducted sale.

Although no Oklahoma statute specifically addresses the question, common law generally requires that there be no material damage to the premises from the time of the sale until the confirmation of that sale at which time title is passed to the purchaser. Evidence was introduced that vandalism of approximately 1/3 the total purchase price paid by the petitioners occurred to the premises between sale and confirmation. Nevertheless the courts did not find this to be material.

Above all, the courts of the states and of the United States are under an important duty to insure that the litigants before them receive equity and justice in the adjudication of their disputes. In the case at bar, mistakes were made by both the banks in the

conduct of their sales and by the petitioners in their attempt to purchase all of the property for $32,000.00. The net result is that the petitioners have been deprived of $32,000.00 of their own funds but have no interest in the property.

The petitioners then perfected appeals of the trial court's decisions confirming both sheriff sales. The appeals were consolidated and a decision was rendered by the Oklahoma Court of Appeals on December 19, 1989 affirming the judgment of the trial court which incredibly found no violation of Oklahoma statutory or case law on the various issues raised by the petitioners. The petitioners petitioned for rehearing which was denied and then for certiorari to the Oklahoma Supreme Court which was also denied. The decision of the Oklahoma Court of Appeals therefore stands as the final decision of the highest court of the State of Oklahoma.

That decision clearly violates the constitutional rights of the petitioners not to be deprived of their property without due process of law as guaranteed to them by the 5th and 14th Amendments of the United States Constitution, for as previously held by the Supreme Court of the United States in International Harvester Credit Corporation v. Goodrich (1956) 350 U.S. 537, 100 L.Ed. 681, 76 S.Ct. 621 at page 549:

> "Property is included within the triad of interests protected by the Due Process Clause of the 14th Amendment—"nor shall any State deprive any person of life, liberty, or property, without due process of law." When one man's property is taken and given to another or, as in this case, is taken to satisfy the debts of another, a justifying public purpose must meet the requirements of the Due Process Clause.

The Supreme Court of the United States has also inquired into the state court's compliance with federal standards of due process in the application of state law to the facts of a particular case as in Thompson v. Consolidated Gas Utilities Corp. (1937) 300 U.S. 55, 81 L.Ed. 510 at page 75 which held in part as follows:

> "But, being under duty to make an independent study of the question, we have done so. That study leaves us in grave doubt whether the lower court has correctly interpreted the

> intention of the lawmakers. On the other hand, we are clearly of opinion that if the Act were construed as the defendants contend it should be, and as the Commission has applied it, it would violate the Federal Constitution."
>
> * * * *
>
> "But where one party's case depends upon a construction of a state statute under which it plainly must be held to violate the Federal Constitution, and where the proper construction of the statute is a matter of grave doubt, this Court will rest its decision on the Constitution, and will not undertake to decide the question of construction as to which it lacks the power to give a definitive answer."

Furthermore, it has been held that the Supreme Court of the United States will make a constitutional inquiry even though specific reference to constitutional violations does not appear before the court below if it sufficiently appears by a clear and necessary intendment that a federal question was presented. Furman v. Nichol (1869) 8 Wall. (U.S.) 44, 19 L.Ed 370; Steines v. Franklin County (1872) 14 Wall. (U.S.) 15, 20 L.Ed. 846; Kaukauna Water Power Co. v. Green Bay & M. Canal Co. (1891) 142 U.S. 254, 35 L.Ed. 1004, 12 S.Ct. 173.

REASONS FOR GRANTING WRIT

By an erroneous and convoluted application of Oklahoma case and statutory law, the petitioners have been deprived of $32,000.00 in cash to purchase what is in effect a void interest in property. They have thus been deprived of that property without meeting the due process requirements of Amendments 5 and 14 of the United States Constitution and this Honorable Court should grant certiorari to review the full record in the case.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

John M. Young
OBA ID #9964
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(918) 224-3131

CERTIFICATE OF MAILING

I hereby certify that on the 31 day of July, 1990, I mailed a true and correct copy of the foregoing instrument with postage prepaid to the following:

Oklahoma Supreme Court Clerk
Oklahoma City, OK

Julie Thomas Rowland
Zarbano, Bridger-Riley
Attorney for Western National Bank of Tulsa
5051 South Lewis, 2nd Floor
Tulsa, Oklahoma

William D. Hunt
Attorney for Union National Bank
P.O. Box 35606
Tulsa, Oklahoma 74153

Philip Wayne Reed
Marie Antoinette Reed
8723 Winding Trail
Fort Worth, TX

John M. Young

APPENDIX A

(Reproduction)

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Tuesday May 8, 1990

THE CLERK IS DIRECTED TO ISSUE THE
FOLLOWING ORDERS:

70,354 (consolidated with 70,355) Western National Bank of Tulsa, a national banking association et al. v. W.R. Benintendi and Delores Benintendi.
Certiorari denied.
All Justices concur.

(filed on December 19, 1989)

NOT FOR PUBLICATION

IN THE COURT OF APPEALS FOR THE STATE OF OKLAHOMA

DIVISION NO. III

WESTERN NATIONAL BANK OF TULSA, a national banking association,	)	
APPELLEE,	)	
vs.	)	No. 70,354
	)	cons. w/
	)	No. 70,355
UNION NATIONAL BANK OF LITTLE ROCK,	)	
APPELLEE,	)	
Phillip Wayne Reed, a single man, Pray, Walker, Jackman, Williamson & Marlar, an Oklahoma professional corporation, Defendants,	)	
and	)	
W. R. Benintendi and Delores Benintendi,	)	
APPELLANTS.	)	

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE DANIEL J. BOUDREAU, JUDGE

AFFIRMED

John M. Young,
YOUNG & YOUNG,
Sapulpa, Oklahoma — For Appellants,

Julie Thomas Rowland,
ZARBANO BRIDGER-RILEY, P.C.,
Tulsa, Oklahoma — For Appellee Western Bank

William D. Hunt,
WILLIAM D. HUNT & ASSOCIATES,
Tulsa, Oklahoma — For Appellee Union Bank

MEMORANDUM OPINION

Opinion by Robert L. Bailey, Chief Judge.

Appellants seek review of the Trial Court's orders denying Appellants' motion for new trial and confirming sheriff's sales. Appellee Union National Bank of Little Rock (Union) held a first mortgage executed by Defendant Reed covering certain property in Broken Arrow, Oklahoma, in the principal sum of about $62,000. Appellee Western National Bank of Tulsa (Western) held a valid second mortgage from Reed covering the same property in the sum of about $28,000. In December, 1986, upon default by Reed, Western filed its Petition for foreclosure of its second mortgage, naming Reed, Union and defendant professional corporation as interest holding defendants. Union filed its answer, asserting the superiority of Union's first mortgage. Reed and the professional corporation filed no appearance or answer and were adjudged in default.

In February, 1987, Western filed its motion for summary judgment, seeking foreclosure of its second mortgage subject to the first mortgage claim of Union. By agreed journal entry signed by Union and Western in May 1987, Western obtained judgment of foreclosure of its second mortgage, subject to the superior first-mortgage claim of Union. In July 1987, Union filed a separate action seeking foreclosure of its first mortgage.

Western then sought Special Execution and Order of Sale on the property in fulfillment of its judgment. Western had the property appraised, value determined at $100,000 and in August, 1987, published notice of sheriff's sale of the property subject to the valid first mortgage of Union. At sheriff's sale on August 25, 1987, it was announced that the sale of the property was subject to a mortgage claim. Appellant Delores Benintendi appeared at the sheriff's sale and submitted a bid on the property in the sum of $32,000, which was accepted as the highest and best bid.

On August 26, 1987, the day after sheriff's sale and purchase of the property thereat by Appellants, Union filed its journal entry of judgment obtained August 24, 1987, which recited Western's failure to appear and granted foreclosure of Union's first mortgage. On September 10, 1987, Western filed its motion to confirm the previous sheriff's sale. On September 24, 1987, Appellants filed their Motion to Set Aside the sheriff's sale, asserting, in essence,

that they were fraudulently induced to purchase the property at sheriff's sale by representations of Western and/or its counsel that the purchase of the property at sheriff's sale was free of any incumbrances of Union or others.

After hearing on Appellants' motion, the Trial Court issued its order confirming Western's sheriff's sale to Appellants, subject to the first mortgage claim of Union. Appellants filed their Motion for New Trial in Western's action, again seeking to avoid Union's superior claim, and further alleging damage to the property, entitling Appellants' to avoid their purchase. Appellants also filed a motion to consolidate the separate foreclosure actions of Western and Union.

On October 29, sheriff 's sale in Union's foreclosure action took place, at which Union was the highest and best bidder, and Union moved to confirm the sale. Appellants moved to intervene in Union's action and objected to confirmation of the sale to Union. Appellants filed amendments to their motion for new trial in Western's action, and all remaining matters in both cases came on for hearing. The Trial Court denied Appellants' motion for new trial arising from confirmation of the Western sale, and overruled Appellants' objection to confirmation of the Union sale. Appellants now seek review of the Trial Court's ruling on the Western sale (Case No. 70,354) and on the Union sale (Case No. 70,355). The cases have been consolidated under surviving case No. 70,354 for resolution.

In five subsections of their first proposition of error, Appellants argue the Trial Court erred in denying their motion for new trial arising from the Western sale and confirming the Union sale for irregularity in both sale proceedings. In the first subsection, Appellants allege that 12 O.S. Supp. 1984 Section 2013(A), governing compulsory counterclaims, required Union to press its superior first mortgage claim in Western's prior suit to foreclose the second mortgage, failure which divested the Trial Court of jurisdiction to entertain Union's subsequent and separate action for foreclosure of the first mortgage. We find, because Western never asserted that its claim was superior to that of Union, that Union was not an indispensable party to the resolution of Western's claim. See, Penner v. State, ex rel. Comm'rs of Land Office, 302 P.2d 144 (Okl. 1956). Therefore, any claim Union might have had

was in the nature of a permissive counterclaim, and failure of Union to set up such a permissive claim in the prior action did not divest the Trial Court of jurisdiction to entertain Union's subsequent action.

In the second subsection, Appellants assert error of the Trial Court in granting Western's oral application for nunc pro tunc amendment of the journal entry in Western's case to reflect (1) correction of the legal description of the property and (2) that Western's judgment of foreclosure was inferior to Union's superior first mortgage claim. In this regard, the journal entry of judgment, as originally prepared and executed by the parties and Court, clearly established that Western's claim was junior and inferior to the claim of Union, but contained conclusory language to the effect that all parties' claims were forever and thereafter barred. Western asserted that this inconsistency within the journal entry was the result of scrivener's error and should be corrected. As we find no reason to dispute Western's allegations of scrivener's error, we find no error by the Trial Court in correcting the journal entry of judgment by order nunc pro tunc to remove any inconsistencies. See e.g., Appl. of Okla. Nat. Gas Co., 715 P.2d 477 (Okl. 1985) (function of order nunc pro tunc to supply omission on the record of action taken but inadvertently omitted.)

In the third subsection, Appellants argue that the Trial Court erred in denying their Motion for New Trial for failure of the Western sale to bring two-thirds of the appraised value of the property. We disagree. The property appraised for $100,000, and by the terms of the Western journal entry and notice of sale, was subject to Union's prior mortgage, then amounting to about $57,200. Thus, the sale to Appellants for $32,000 was in an amount in excess of two-thirds of the value of the equity in the property after deduction of the first mortgage amount, and was proper under 12 O.S. 1981 Section 762. Miller v. American Bank & Trust Co., 171 Okl. 99, 40 P.2d 1074 (1935); Hewitt v. Voils, 147 Okl. 270, 296 P. 447 (1931). The Trial Court's denial of Appellant's Motion for New Trial based on alleged insufficiency of the sheriff's sale price was therefore unaffected by error.

In the fourth subsection, Appellants argue inadequacy of the notice of sheriff's sale issued in the Western case due to failure of the notice to specify the amount of attorneys' fees and costs

awarded to Union in Union's action. In the fifth subsection, Appellants assert that Union's failure to file its judgment with the County Clerk under 12 O.S. 1981 Section 706 rendered Union's judgment void. Western's failure to notify prospective purchasers of Union's claim for attorney's fees has no effect on the Western sale, as the attorney fees and costs awarded to Union arose from an action properly separate and distinct from Western's action. The failure of Union to register its judgment with the clerk under Section 706 affects only the validity of the judgment as a lien on the judgment debtor's other property within the county, and again has no effect on the validity of the Union sheriff's sale.

In their second proposition of error, Appellants assert that there was substantial damage to the property between Appellants' inspection of the property before and after the sale. In the main, Appellants assert that a metal storage building on the property at the time of their initial inspection was removed at some time between their inspection and purchase at sheriff's sale, and that this constitutes "material damage" to the property so as to justify relieving Appellants of their obligation to purchase. See, 55 Am.Jur. 2d Mortgages Section 846 ("A purchaser at a mortgage foreclosure sale may be relieved of his obligation where, after the date of sale, but before conveyance is made, the property is destroyed or materially damaged.")

While we have found no Oklahoma authority directly on-point, and while we have no doubt such a rule would be applied in this state under the proper circumstances, we do not find such to be the case herein. The Trial Court heard the evidence of "damage," and tacitly rejected this argument. Any relief which the Trial Court might grant in such a case is purely equitable, and as with equity decisions by the Trial Court generally, the lower court's determinations will not be disturbed unless against the weight of the evidence or affected by abuse of discretion. We find the Trial Court's implicit rejection of Appellants' assertion of vitiating "damage" neither contrary to the weight of the evidence nor affected by abuse warranting reversal.

In their third proposition, Appellants assert in essence that it is inequitable to force the sale of the property on them subject to the first mortgage of Union when Appellants purchased the property thinking the property to be free and clear of other encumberances.

Appellants assert hereunder that they were told by an agent of Western that a purchase of the property at sale would be free and clear of incumbrances. The Trial Court specifically found "[t]he evidentiary material submitted did not support (Appelants) allegation, and did not support the allegation of any type of fraudulent or inequitable conduct on the part of (Western) that induced (Appellants) to make the subject matter bid." We go no farther than to say that we believe the property was properly sold in satisfaction of Western's second mortgage subject to the valid first mortgage of Union. See also, Sherman v. Gens and Barall Inv. Co., 172 Okl. 618, 46 P.2d 491 (1935).

No reversible error of law appears and the findings of fact by the Trial Court are supported by sufficient evidence. The order of the Trial Court is therefore AFFIRMED. Rule 1,202(b), 31 Rules of Appellate Procedure, 12 0.S. 1983 Sup., Ch. 15, App 2

HANSEN, P.J. and REYNOLDS, J. concur.

(Filed on May 26, 1987)

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

WESTERN NATIONAL BANK OF TULSA, a National Banking Association,	)	
Plaintiff,	)	Case No. CJ-86-07721
vs	)	
PHILLIP WAYNE REED, a single man; UNION NATIONAL BANK OF LITTLE ROCK, a National Banking Association; and PRAY, WALKER, JACKMAN, WILLIAMSON & MARLAR, an Oklahoma Professional Corporation,	)	
Defendants.	)	

JOURNAL ENTRY OF JUDGMENT

THIS cause coming on for hearing this 13th day of April, 1987, pursuant to Plaintiff's Motion for Summary Judgment sustained herein; before the undersigned Judge of the District Court; Plaintiff appearing by and through its attorney of record, Julie Thomas Rowland; Defendant Union National Bank of Little Rock appearing by and through its attorney of record, Lisa K. Thompson; Defendants, Philip Wayne Reed and Pray, Walker, Jackman, Williamson & Marlar, an Oklahoma Corporation, having been duly served with summons and notice of this hearing, wholly failed to appear. Said Defendants are therefore in default and barred, restrained and enjoined from claiming any right, title or

interest in and to the subject properly. The Court, having examined the pleadings and the evidence offered therein, and in consideration thereof finds as follows:

1. All of the allegations of the Plaintiff's Motion for Summary Judgment are true and Western is entitled to judgment against Philip Wayne Reed in the amount of Forty-Two Thousand Three Hundred Forty-Three Dollars 89/100 ($42,343.89) together with interest accruing thereon at the rate of Fourteen Dollars 21/100 ($14.21) per diem from May 5, 1987 until paid in full, plus all accruing costs of this action, including attorney's fees, with interest upon all of said sums from the date of judgment until paid.

2. Western has a valid second lien on the real estate and improvements described in its Petition by virtue of the mortgage therein described, to secure payment of the indebtedness. Said real estate is described as follows:

> The East Half of the South Three Hundred Twenty Feet (320') of Lot Two (2), Section Three (3), Township Seventeen (17) North, Range Fourteen (14) East of the Indian Base and Meridan, according to the United States Government survey thereof.

3. Union National Bank of Little Rock has a valid first and prior lien on the real estate and improvements described above by virtue of a mortgage dated January 28, 1977 and filed of record January 28, 1977 in Book 4248 at Page 1885 and subsequently assigned to Union National Bank of Little Rock January 12, 1981 and filed of record of the Tulsa County Clerk, Tulsa County, State of Oklahoma. Said mortgage interest is superior to that of Western.

4. Western elects to have the real estate and improvements hereinabove described foreclosed and sold, subject to the first mortgage of Union National Bank of Little Rock, with appraisement, and such election is hereby approved and said sale shall be with appraisement.

IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED, by this Court as follows:

5. Western have and recover of and from the Defendant, Philip Wayne Reed, a judgment in the amount of Forty-Two Thousand

Three Hundred Forty-Three Dollars 89/100 ($42,343.89), together with interest accruing thereon at the rate of Fourteen Dollars 21/100 ($14.21) per diem from May 5, 1987, until paid, plus attorney's fees in the amount of One Thousand Five Hundred Dollars ($1,500.00), plus the continued costs of this action, for all of which let execution issue.

6. Western has a second mortgage lien on the real estate and improvements, the legal description of which is

> The East Half of the South Three Hundred Twenty Feet (320') of Lot Two (2), Section Three (3), Township Seventeen (17) North, Range Fourteen (14) East of the Indian Base and Meridian, according to the United States Government survey thereof.

It is hereby adjudged and established to be a good and valid lien upon said real estate and improvements, the judgment indebtedness of Western being secured by said lien.

7. Union National Bank has a first and prior mortgage lien on the real estate and improvements described above and it is hereby adjudged and established to be a good and valid lien upon said real estate and improvements, the mortgage indebtedness of Union National Bank being secured by said lien.

8. Upon the failure of the Defendant Philip Wayne Reed, to satisfy all of the judgments described above, the Sheriff of Tulsa County, Oklahoma, shall levy upon the above-described real estate and improvements, and after having the same appraised as provided by law, shall proceed to advertise and sell the same according to law, subject to the first mortgage of Union National Bank of Little Rock, and shall immediately turn over the proceeds thereof to the District Court Clerk who shall apply the proceeds arising from said sale as follows:

a. In payment of the costs of this action;

b. In payment to Western National Bank of its judgment as hereinabove setforth; and

c. The residue, if any, shall be deposited with the Clerk of the Court to await further order of this Court.

9. From and after the sale of said real estate, all of the parties to this action, and each of them, and all persons claiming under them or any of them, shall be and they are hereby forever barred and foreclosed of and from any and every lien upon, right, title, interest, estate, or equity of redemption, in or to said real estate, or any portion thereof.

10. Upon confirmation of the sale hereinabove ordered, the Sheriff shall execute and deliver a good and sufficient deed to the real estate and improvements to the purchaser, who shall convey all the right, title, interest, estate, and equity of redemption of all the parties herein, and all persons claiming under all of the parties herein, and each of them, since the filing of the Notice of Pendency of Action, and upon application of the purchaser, the Court Clerk shall issue a Writ of Assistance to the Sheriff who thereupon and forthwith shall place said purchaser in full and complete possession and enjoyment of said real property and improvements.

_____

JUDGE OF THE DISTRICT COURT

Approved as to Form and Content:

_____

Julie Thomas Rowland, OBA #11497
Zarbano, Bridger-Riley, P.C.
400 South Boston, Suite LL
Tulsa, Oklahoma 74103
(918) 587-2766
Attorney for Western National Bank

_____

Lisa K.Thompson
Wilson & Associates
750 Union National Plaza
Little Rock, Arkansas 72201
Attorney for Union National Bank

CERTIFICATE OF MAILING

I hereby certify that on the 26th day of May, 1987, a true and correct copy of the above and foregoing Journal Entry of Judgment was mailed in the United States Mail with proper postage thereon fully prepaid to the following:

Lisa K. Thompson
Wilson & Associates
750 Union National Plaza
Little Rock, Arkansas 72201
Attorneys for Defendant Union National Bank

Philip Wayne Reed
8723 Winding Road
Fort Worth, Texas 96112

Pray, Walker, Jackman, Williamson & Marlar
c/o Donald Pray
900 OneOK
Tulsa, Oklahoma 74103

_____
Julie Thomas Rowland

(Filed on August 29, 1987)

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

UNION NATIONAL BANK OF LITTLE ROCK,	)	
	)	
Plaintiff,	)	
	)	Case No.
	)	CJ 874317
vs.	)	
	)	
PHILIP WAYNE REED,	)	
WESTERN NATIONAL BANK OF TULSA,	)	
PRAY, WALKER, JACKMAN, WILLIAMSON &	)	
MARLAR, and ANTOINETTE LYNN REED,	)	
	)	
Defendant.	)	

JOURNAL ENTRY OF JUDGMENT

NOW ON THIS 29th day of August, 1987, there comes on for hearing the foregoing case before the undersigned Judge, the Plaintiff appearing by its attorneys, William D. Hunt & Associates - P.C., the Plaintiff, having previously dismissed JOHN DOE RESIDENT and JANE DOE RESIDENT, and JANE DOE REED, from this action, and it appearing to this Court that this is an action upon a Promissory Note and for foreclosure of a Mortgage upon real estate securing the same, which said real estate is located in the County of Tulsa, State of Oklahoma.

It appearing to the Court that the Defendants, PHILIP WAYNE REED, and ANTOINETTE LYNN REED, and each of them, were duly served, and have not answered either in person or by attorney, and each having been three times call in open court to appear or answer, came not, but made default. Therefore PHILIP

WAYNE REED, ANTOINETTE LYNN REED, and each of them are adjudged to be in default.

The Court further finds from the Affidavit filed herein that none of the Defendants named herein, are engaged in the military service of the United States within the meaning of the Soldiers' and Sailors' Civil Relief Act of 1940 as Amended; and this cause is hereby ordered to proceed to trial.

Thereupon the case came on for trial and being triable to the Court without the intervention of a jury, the Court proceeded to examine the pleadings, the note and mortgage being sued upon herein, which instruments were introduced into evidence, the testimony of witnesses duly sworn, and there being no necessity for pretrial conference, and upon being fully advised, finds that all of the allegations and averments of Plaintiff's Petition are true and the Court finds that it has jurisdiction over the parties and the subject matter of this action and the Court having heard the arguments of counsel and being well and truly advised finds:

That the Plaintiff, UNION NATIONAL BANK OF LITTLE ROCK, should have and recover judgment on its note and mortgage sued upon herein for the sum of $54,546.05, plus interest to July 17, 1987, in the sum of $2,738.84 and thereafter at the rate of 8.00% per annum until paid; attorney's fees of $5,455.00; $219.00 for abstracting; all advances for taxes and hazard insurance; $113.00 and all further costs for service of process; $60.00 and all further costs of preserving and maintaining the property; $80. 33 and all other late charges due under said Note and Mortgage; and the court costs herein under the Note and Mortgage of Plaintiff sued on herein, and that it owns a good and valid first mortgage lien upon the following described property situated in TULSA County, Oklahoma, to-wit:

> The East Half of the South Three Hundred Twenty Feet (320') of Lot Two (2), Section Three (3), Township Seventeen (17) North, Range Fourteen (14) East of the Indian Base and Meridan,
>
> an addition to the City of Broken Arrow, TULSA County, State of Oklahoma, according to the U.S. Government Survey thereof.

Plaintiff's mortgage lien is superior to the claims of all Defendants, said Mortgage having been recorded in the office of the County Clerk of TULSA County, Oklahoma, on January 28, 1977, in Book 4248 at Page 1885, and assigned to Plaintiff as alleged in said Petition.

That default occurred under said Note and Mortgage as alleged in said Petition and Plaintiff as owner and holder of said Note and Mortgage is entitled to judgment as aforesaid.

That the Defendant, WESTERN NATIONAL BANK OF TULSA, a corporation, has a valid mortgage lien on the above described property junior and inferior to the rights of Plaintiff, and said mortgage is recorded in Book 4856, at Page 2028 in the records of TULSA County Clerk.

The Defendant, WESTERN NATIONAL BANK OF TULSA, has a valid lien on the property pursuant to a judgment in Tulsa County District Court Case CJ 86-7721 styled WESTERN NATIONAL BANK OF TULSA v. PHILIP WAYNE REED, UNION NATIONAL BANK OF LITTLE ROCK, and PRAY, WALKER, JACKMAN, WILLIAMSON & MARLAR - P.C.; said judgment lien is in the sum of $42,343.89; plus attorney's fees of $1,500.00 and costs; and is recorded in Book 5009, at Page 2500 in the records of Tulsa County Clerk; said judgment lien is junior and inferior to Plaintiff's mortgage lien on said property.

That the Defendant, PRAY, WALKER, JACKMAN, WILLIAMSON & MARLAR, a corporation, has valid mortgage lien on the above described property junior and inferior to the rights of Plaintiff, and said mortgage is recorded in Book 4968 at Page 1885 in the records of TULSA County Clerk.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court that Plaintiff, UNION NATIONAL BANK OF LITTLE ROCK, a national banking corporation, have joint and several judgment against the Defendants, PHILIP WAYNE REED and ANTOINETTE LYNN REED for the amount due and owing under the above described Note and Mortgage in the sum of $54,546.07; plus interest in July 17, 1987, in the sum of $2,738.84 and thereafter at the rate of 8.00% per annum until paid; attorney's fee of $5,455.00; $219.00 for abstracting; all advances for taxes and hazard insurance; $113.00 and all further costs for service of process; $60.00 and all further

costs of preserving and maintaining the property; $80.33 and all other late charges due under said Note and Mortgage; and the court costs herein under the Note and Mortgage of Plaintiff sued on herein; and that it owns a good and valid first mortgage lien; plus all costs of this action both accrued and accruing; this judgment is to be in personam.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the liens and claims of the parties to this action, beginning with the lien on the property which is senior and superior to all of the remaining liens and claims are as follows:

1. Mortgage lien of Plaintiff as above described.

2. Second mortgage lien and judgment lien of Defendant, WESTERN NATIONAL BANK OF TULSA.

3. Third mortgage lien of Defendant, PRAY, WALKER, JACKMAN WILLIAMSON & MARLAR

It further appears that Plaintiff's Mortgage herein sued upon provides that appraisement of said premises is waived or not waived at the option of mortgagee and the Court finds that the Plaintiff has stated in open court its election under the terms of said Note and Mortgage to have said real estate sold with appraisement.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Mortgage of said Plaintiff, as above described, be, and the same is hereby foreclosed and said premises is hereby ordered to be sold to satisfy judgment herein; that a special execution and order of sale and foreclosure shall issue commanding the sheriff to levy upon the above described real estate, and after having the same appraised as provided by law, shall proceed to advertise and sell the same as provided by law, and apply the proceeds from said sale as follows:

FIRST To the payment of costs of said sale and court costs herein.

SECOND To the payment of the amount due Plaintiff, together with interest, attorney fees, abstracting

expenses, and all other costs as per the judgment above entered.

THIRD The remainder, if any there be, as the Court may direct.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that from and after the sale of said real estate under and by virtue of this judgment and decree that the Defendants, and each of them, and all persons claiming under them or any of them, and they are hereby forever barred and foreclosed of and from any all right, title or interest, estate or equity in and to said real estate or any part thereof.

s/ _____
JUDGE OF THE DISTRICT COURT

APPROVAL AS TO FORM:

WILLIAM D. HUNT & ASSOCIATES - P.C.

By: s/ _____
Richard Davis,Jr
Attorney for Plaintiff

APPENDIX B

12 O.S. Section 2013

COUNTERCLAIM AND CROSS-CLAIM

A. COMPULSORY COUNTERCLAIMS. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if:

1. At the time the action was commenced the claim was the subject of another pending action; or

2. The opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim pursuant to this section.

B. PERMISSIVE COUNTERCLAIMS. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

12 O.S. Section 762

LIEN RESTRICTED TO PROPERTY LEVIED ON WHEN TWO-THIRDS OF APPRAISED VALUE SUFFICIENT TO SATISFY JUDGMENT — AMOUNT FOR WHICH PROPERTY SOLD — SALE FOR DEBT OR TAXES DUE STATE

If, upon such return, as aforesaid, it appears, by the inquisition, that two-thirds (2/3) of the appraised value of said lands and tenements, so levied upon is sufficient to satisfy the execution, with costs, the judgment on which such execution issued shall not operate as a lien on the residue of the debtor's estate, to the prejudice of any other judgment creditor; but no such property shall be sold for less than two-thirds (2/3) of the value returned in the inquest; and nothing in this section contained shall, in any wise, extend to affect the sale of lands by the state, but all lands, the property of individuals indebted to the state for any debt or taxes, or in any other manner, shall be sold without valuation, for the discharge of such debt or taxes, agreeably to the laws in such cases made and provided.

12 O.S. Section 764

RETURN OF APPRAISEMENT—SALE

A. Lands and tenements taken on execution shall not be sold unless the party causing the execution to be issued:

1. causes a written notice of sale executed by the sheriff containing the legal description of the property to be sold and stating the date, time, and place where the property will be sold to be mailed, by first class mail, postage prepaid, to the judgment debtor, any holder of interest of record in the property to be sold whose interest is sought to be extinguished, and all other persons of whom the party causing the execution to be issued has notice who claim a lien or any interest in the property whose interest is sought to be extinguished, at least ten (10) days prior to the date of the sale, if the names and addresses of such persons are known.